UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

CHARDONNAY/CLUB SHAKESPEARE, INC., No. 04-10986

Debtor(s).
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Memorandum on Motion to Sell Free and Clear

Debtor Chardonnay/Club Shakespeare, Inc., is the owner of a failed golf course in Napa, California. It has entered into an agreement to sell the real property on which the golf course was operated for about $16 million. By its present motion, Chardonnay seeks an order that the sale is free and clear of various liens and interests, with those liens and interests attaching to the proceeds of the sale.

Of the numerous lien and interest holders, all have consented save one group, known as the Founding Members. While the Founding Members do not contest the sale price or other terms of sale, they argue that the Bankruptcy Code does not permit sale free and clear of their interests.

The Founding Members claim rights in the real property Chardonnay wishes to sell pursuant to a two-page document entitled "Memorandum of Golf Privileges" (hereinafter "MGP") signed by an officer of Chardonnay Golf Club, Inc., a prior owner of the property. The MGP was recorded in 1989, and purports to grant to each Founding Member a lifetime right to use the golf course without fee. It further provides:

> The privileges contained herein shall be binding upon Owner, and the successors and assigns of Owner, and shall constitute covenants running with, and irrevocable servitudes upon, the real property described in Exhibit "B."

The MGP makes no mention of what the rights of the Founding Members (referred to in the MGP as "Privilege Holders") are if there is no longer a golf course on the property, nor does it specifically require the owner of the property to provide a golf course.

The power to sell free and clear pursuant to § 363(f) of the Bankruptcy Code is an expansive one. So long as an interest is subject to a good faith dispute or one of the other four conditions set forth in that section is present, a trustee or debtor in possession may exercise the right. The sort of interest subject to the right is liberally interpreted in favor of the bankruptcy estate and certainly encompasses any interest created by the MGP. *See* **3 Collier on Bankruptcy** (15th Ed. Rev.), ¶ 363.06[1], pp. 363-44 to 363-45.

Both sides have become considerably bogged down in a dispute over the nature of the interest created by the MGP under state law. However, the court does not see that as a crucial factor as the vagueness of the MGP and the priority issues seem much more substantial. The Founding Members argue that the nature of the interest is crucial because they have found two cases which they think stand for the proposition that if the court determines their interest is an easement then the estate representative may never sell free and clear of it. The fact that they have mis-read these cases is made clear merely by quoting from a footnote of one of those cases, *In re Oyster Bay Cove, Ltd.*, 196 B.R. 251, 256n9 (E.D.N.Y 1996):

> Three of the five instances where property may be sold "free and clear" of an interest will never, by law, apply to an easement. Only consent or dispute, neither of which apply in this case, would have allowed the Trustee to sell the property "free and clear" of the easements.

The Founding Members argue that their interests are not subject to bona fide dispute, but it is hard for the court to see how there could be more of a dispute. Not only do they argue that the MGP obligates the owner of the property to provide them with a golf course, even if there is no income to pay

for it, but they also argue that their interests are superior to the consensual liens on the property, including the lien of the court-approved postpetition lender, so that any purchaser at a foreclosure sale would be obligated to provide a golf course for them. Needless to say, these arguments are hotly contested by both Chardonnay and the lienholders. In the event that the sale is not made and there is a foreclosure, there will be considerable litigation between the eventual owner of the property and the Founding Members.

In order to find a good faith dispute, there need only be an objective basis for either a factual or legal dispute as to the validity of the interest; the court is not supposed to resolve the dispute at this stage, but only determine that it exists. **3 Collier on Bankruptcy** (15th Ed. Rev.), ¶ 363.06[5]. There does not appear to be any basis for an argument that the disputes over the rights of the Founding Members are not raised in good faith. The brevity and vagueness of the MGP are alone enough to raise serious disputes; at some point an agreement is simply too vague to be enforced. In addition, the priority issues are very serious and will require litigation to resolve.

The purpose of § 363(f) is to permit property of the estate to be sold free and clear of interests that are disputed by the representative of the estate so that liquidation of the estate's assets need not be delayed while such disputes are being litigated. *In re Clark*, 266 B.R. 163, 172 (9th Cir.BAP 2001). Litigation of the rights of the Founding Members would significantly delay the sale of the property, and probably insure its loss to foreclosure. Even then, disputes will remain. The disputes are serious and bona fide.

For the foregoing reasons, the sale will be free and clear of the interests of the Founding Members created by the recording of the MGP. Their interests will attach to the proceeds of sale pending an adversary proceeding to determine the validity, extent and priority of the liens and interests. Since the Founding Members claim that their rights are senior to all other liens and interests, none shall be paid until their rights are adjudicated. If the Founding Members prevail on their asserted claims, there will be almost $16 million to compensate them for the loss of their golf rights.

Counsel for Chardonnay shall submit an appropriate form of order.

Dated: March 10, 2005

Alan Jaroslovsky
U.S. Bankruptcy Judge